
(2014) 04 BOM CK 0165
In the Bombay High Court
Case No : Writ Petition No. 2662 of 2013

Dr. Manilal V. Valliyate

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 07-04-2014

Acts Referred:

Constitution of India, 1950 — Article 21, 51A(g)
Wild Life (Protection) Act, 1972 — Section 4(2), 42, 5

Citation : (2014) 3 ABR 663 : (2015) 1 BomCR 818 : (2014) 4 FLT 458 : (2014) 3 MhLj 209

Hon'ble Judges : V.M. Kanade, J;A.K. Menon, J

Bench : Division Bench

Advocate : Shiraz Rustomjee, Senior Counsel in Writ Petition No. 2662 of 2013, Rohan Rajadyakhsa in Writ Petition No. 2662 of 2013, Bomin Badani in Writ Petition No. 2662 of 2013, Mr. Y.S. Jahagirdar, Senior Counsel in Writ Petition No. 887 of 2014, S.S. Patwardhan i/b. A.M. Savagave in Writ Petition No. 887 of 2014, Advocate for the Appellant; J.S. Saluja, A.G.P. for Respondent No. 1 in Writ Petition No. 2662 of 2013, Mr. S.A. Sawant for Respondent No. 2 in Writ Petition No. 2662 of 2013 and for Respondent No. 5 in Writ Petition No. 887 of 2014, Mr. Parag Vyas for Respondent No. 3 and 5 in Writ Petition No. 2662 of 2013 and for Respondent No. 2 and 4 in Writ Petition No. 887 of 2014, Mr. Y.S. Jahagirdar, Senior Counsel in Writ Petition No. 2662 of 2013, S.S. Patwardhan i/b. A.M. Savagave for Respondent No. 4 in Writ Petition No. 2662 of 2013, Mr. A.B. Vagyani, A.G.P. for Respondent Nos. 1 and 3 in Writ Petition No. 887 of 2014, Mr. Shiraz Rustomjee, Senior Counsel, Rohan Rajadyakhsa and Bomin Badani for Respondent No. 6 in Writ Petition No. 887 of 2014, Advocate for the Respondent

Judgement

A.K. Menon, J.—Rule. Rule, made returnable forthwith. Learned counsel for the Respondents waive service. By consent of the parties, both the petitioners are finally heard.

2. The subject matter of the above Petitions is welfare of "Sunder" an Elephant in captivity. These two petitions can be conveniently disposed of by this common order. Writ Petition No. 2662 of 2013 ("First Petition") is filed on the Original Side

on 20th November, 2013 and seeks the following reliefs:-

(a) Issue a Writ of certiorari and/or any other writ, order or direction quashing the Ownership Certificate No. 1-12-B-a-KLP-220-1365 dated Nil (Exhibit-D) issued in respect of Sunder by Respondent No. 1 in favour of Respondent No. 2 as well as earlier ownership certificate dated 3/2/2007 (Exhibit-A).

(b) Direct Respondent No. 1 to forthwith implement the order dated 21/8/2010 issued by the Joint Secretary (Forests), Government of Maharashtra (Exhibit-G).

(c) Ad-interim order in terms of prayer (b).

In the First Petition, the Petitioner is charitable organization set up inter alia for prevention of cruelty to animals. The Petition raises an issue of welfare and upkeep of elephants in captivity particularly Sunder who is presently in the custody of Devasthan Management Committee, Shri Kedarnath Devasthan Jyotiba, Dist. Kolhapur and the Respondent No. 4.

3. Writ Petition No. 887 of 2014 ("Second Petition") is filed on the Appellate Side on 17th January, 2014 and seeks the following reliefs:-

A) That this Hon"ble Court be pleased to issue a writ of mandamus or any other appropriate writ, or direction in the nature of mandamus thereby directing Respondent No. 1 to withdraw/recall the order dated 21st August, 2012 passed by it thereby directing that Sunder elephant be set free and relocated to Wild Life Rescue and Rehabilitation Centre, Bengaluru, Exhibit-D hereto.

B) That this Hon"ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction in the nature of mandamus thereby directing Respondent No. 2 to withdraw/recall the order dated 9th November, 2012 by which Respondent No. 2 has directed Respondent No. 3 to take custody of Sunder elephant by following the provisions of Wild Life (Protection) Act, 1972 Exhibit-F hereto.

C) Pending hearing and final disposal of this writ petition, this Hon"ble Court be pleased to stay the operation, implementation and effect of the order dated 21st August, 2012 passed by Respondent No. 1 Exhibit-D hereto and order dated 9th November, 2012 passed by Respondent No. 2 Exhibit-F hereto.

D) Interim and ad-interim relief in terms of prayer clause (C) above be granted.

The Petitioner in the Second Petition is a Member of the Legislative assembly in Maharashtra and is also Respondent No. 6 in the First Petition.

4. Few relevant facts needs to be narrated:-

On 3rd February, 2007, one Mr. Moneshwar Maran ("Maran"), resident of Punisi, District Tinsukia, Assam was issued an ownership certificate in respect of Santu a.k.a. Sunder u/s 42 of the Wildlife (Protection) Act, 1972 ("the Act"). Maran sought permission for transportation of Sunder from Assam to Bihar to enable Sunder to participate in religions functions. Maran then gifted said Sunder to

Ram Naresh Singh, who in turn gifted Sunder to Respondent No. 2. The Additional Chief Wildlife Warden issued an ownership certificate. The "gifts" appear to be given to avoid consequences of sale and trade in Wildlife animals under the Act.

5. It transpires that in May, 2012, the Petitioner received innumerable complaints about the cruel treatment meted out to Sunder. The Animal Welfare Officer visited the temple and made observations about the condition of Sunder and obtained photographs on the basis of which he filed a criminal complaint under the Act at Kodali police station, Kolhapur. The said complaint had alleged that Sunder was (a) kept chained at the temple for the past six years, (b) his mahout used a spiked chain and administered sedatives orally, to control him, (c) denied adequate food, sufficient water and daily walks (d) Sunder had reportedly suffered and serious injury to his right eye as a result of the mahout's use of sharp metal tipped weapon and had many injury marks all over his body.

6. On 2nd August, 2012 the Petitioner made a representation to the Hon'ble Minister for Forests, Maharashtra about cruelty being caused to Sunder and to shift him to a sanctuary. On 3rd August, 2012 the Petitioner wrote a letter to the Chief Conservator of Forest (Wildlife), Maharashtra and to CCF Kolhapur for initiating action and transfer of Sunder to an elephant sanctuary in Karnataka.

7. Pursuant to a meeting called by the Hon'ble Minister a decision was taken, the Joint Secretary (Forests), the Government of Maharashtra to set free Sunder and relocate him to Wildlife Rescue Rehabilitation Centre, Bangalore. On 21st August, 2012, the Joint Secretary (Forests), Revenue and Forest Department directed the Principal Chief Conservator of Forests (Wildlife), Nagpur, Maharashtra State that he should set Sunder free from Jyotiba Temple and immediately implement the relocating process to Elephant Centre, Bengaluru [Wildlife Rescue and Rehabilitation Centre (WRRRC), Bengaluru] in accordance with the rules under the provisions of the Act.

8. We may mention here that in the second petition, the Petitioner has sought to question the jurisdiction of the Joint Secretary (Forests), Revenue and Forest Department to issue such an order and prayed for recalling of the said order. We will address this issue at the appropriate stage.

9. On 3rd September, 2012 the Joint Secretary, PCCF directed the Chief Conservator of Forests to issue a show cause notice for violation of Section 42 of the Act and to initiate steps for cancellation of the ownership certificate issued to the owner. On 14th October, 2012, Respondent No. 3 i.e. Central Zoo Authority, New Delhi ("CZA") at the request of Respondent No. 1 appointed a Committee to inspect Sunder and the facilities provided and submit a report. A report dated 19th October, 2012 was submitted and inter alia following recommendations are made:-

(i) that the living space and environment is to be immediately enlarged by closing 40 to 50 acres of available land near the Jyotiba Temple;

- (ii) Protected contact enclosures (PCE) is to be created where the elephants may be allowed walk freely, with no chains for a minimum of 20 hours a day;
- (iii) Sunder may be housed in a PCE instead of chaining during musth period.
- (iv) Sunder be allowed to forage and graze, though there is ample opportunity to do so.
- (v) The identified land is amidst forest and natural surroundings;
- (vi) Sunder to exercise for a minimum 6 to 8 hours to avoid health issues;
- (vii) Sunder needs presence of more elephant companions and his isolation from elephants will cause loneliness and psychological damage;

10. In the meantime, Respondent No. 4, a Member of the Maharashtra Legislative Assembly, wrote a letter dated 19th October, 2012 to the Principal Secretary (Forests), Maharashtra promising to ensure the welfare and upkeep of Sunder and similarly placed elephants inter alia observing that the plight of captive elephants in Maharashtra is indeed very pathetic and the Warana Group of Industries would like to pledge its sincere commitment and unending financial support to the cause of elephant welfare in Maharashtra. Respondent No. 4 expressed his willingness to establish a suitable facility along International standards in the interest of elephant welfare inter alia for housing of Sunder, as per design, specifications and guidelines laid down by CZA and as advised by the experts. He claims that a land belonging to Jyotiba Temple Devasthan Board has been identified for the purpose. Respondent No. 4 requested the Principal Secretary Forests that in view of the written commitment and promises and keeping in mind the cultural and religious sentiments and faith of the people of the area and the Jyotiba Temple, Sunder be permitted to be retained by Jyotiba Temple in Kolhapur. There was no sign of any challenge to the Order of relocation.

11. On 12th April, 2013 the Petitioner issued a legal notice to Respondent Nos. 2 & 4 inter alia calling upon them to show cause why legal proceedings should not be adopted for protection and welfare of Sunder, including cancellation of the ownership certificate and its translocation to Wildlife Rescue Rehabilitation Centre, Bangalore. The Petitioner annexed several photographs in an attempt to demonstrate the living conditions of Sunder, injuries inflicted in captivity and also photographs of the elephant shelter adjacent to the Kalesar Wildlife Sanctuary, Haryana which according to the Petitioner was suitable for the elephant.

12. At this point, it is convenient to observe that the condition of the elephant as obtaining from the photographs is not disputed by either the Petitioner or Respondent No. 4, although affidavits have been filed by Respondent No. 4 on 19th December, 2013 and Respondent No. 2 on 23rd January, 2014. The Petitioner, therefore, seeks the enforcement and implementation of the order dated 21st August, 2012 issued by the Joint Secretary (Forests), Revenue and Forest Department and also seeks quashing of the ownership certificate. Respondent No. 4 has challenged the Petitioner's locus in filing the petition as

the cause of action arises at Kolhapur and the CC (Regional), Kolhapur is seized of the complaint about the ownership. Apropos the ownership of the elephant, we find that the Petitioner has already taken up the issue of ownership and a complaint dated 3rd September, 2012 for violation of Section 42 of the Act is pending before the appropriate authority, we do not propose to grant any relief at this point, except to request the authority to consider the application without undue delay.

13. Respondent No. 4 disputed the jurisdiction of the Joint Secretary (Forests), Revenue & Forest Department to issue order dated 21st August, 2012 and contends that the said order cannot be enforced by issuing a writ. He reiterates his willingness to establish suitable facilities of International standards in the interest of elephants' welfare. He contends that pursuant to the request of Respondent No. 2 to him as Chairman of Warana Sahakari Sakhar Karkhana Ltd. to accommodate Sunder in the premises of the karkhana pending infrastructure to be set up on the premises of Respondent No. 2, accordingly, Sunder is presently maintained in Warananagar. He also denied all the allegations about Sunder being kept chained. In fact, all the allegations about ill-treatment of the elephant have been denied. Respondent No. 4 relied upon the "Observation Report" dated 15th December, 2013 wherein the Livestock Development Officer, Taluka New Veterinary Ploy Clinic, Kudoli, Dist. Kolhapur has certified that the elephant is in sound health and is showing early signs of "Pre Musth". Respondent No. 4 states that it is not feasible to send Sunder to Bengaluru since according to the Petitioner itself, the facility is not functional. He relies upon the letter dated 12th December, 2013 issued by the Petitioner to the Principal Chief Conservator of Forest (Wildlife), Nagpur which inter alia states that Sunder may be shifted to Mathura and that all the expenses for the upkeep and maintenance will be taken care of by PETA in association with Wildlife authorities.

14. There is an affidavit in reply dated 16th January, 2014 filed by Respondent No. 1 which also denies the allegations of ill-treatment and inter alia claims that the Devasthan Committee passed Resolution that they comply with the guidelines for establishing the Rescue & Rehabilitation Centre and for that purpose land will be made available. Despite the Petitioner's efforts and although Respondent No. 2 and 4 showing willingness and intention to create and support infrastructure as far as 19th October, 2012, no steps whatsoever has been taken till date.

15. The Petitioner has in its rejoinders dated 17th January, 2014 and 18th February, 2014 denied the averments made by Respondent Nos. 2 & 4 in their affidavits and relied upon the assessment report of captive Sunder issued by Centre for Elephant Studies, College of Veterinary & Animal Science, Department of Forest, Kerala dated 23rd December, 2013. The assessment report dated 23rd December, 2013 is carried out by two persons one Project Director, Centre for Elephant Studies, College of Veterinary and Animal Sciences, Mannuthy, Kerala and Forest Veterinary Officer, Konni, Pattanamthitta. From the assessment

summary, it is clear that although Sunder did not show any clinical signs of decease, his behaviour was stereotypical with extreme head swaying due to absence of lack of exercise to balance their energy level, long periods of inactivity, persistent chaining to one place and absence of enrichment in living environment and the fact that the animal housing was not scientific and not satisfactory and he is under threat of physical injury and associated problem if tethering continues in this condition. Scars were detected arising from tight chains and rope used for restraining the animal. Sunder appeared to be deficient in some nutrition especially essential vitamins which have to be supplemented through natural food. The mahout seems to be highly inexperienced to handle the day to day scientific elephant management practices involving proper grooming, washing and other routine management. The management practices of bathing, grooming, cleaning of nails, exercising, humane and scientific restraining, etc. were not satisfactory.

16. An affidavit has been filed by the Deputy Conservator of Forest, Kolhapur Division. On 10th December, 2013 this Court had directed that compliance report of the order passed by IGF & Director (Project Elephant). On 23rd December, 2013 this Court recorded that the report submitted indicates that attempts made for shifting the elephant to Bengaluru were not possible due to the elephant being non co-operative and the matter was directed to be placed for final disposal. It appears from the affidavit that attempts and persuasive efforts were made on several occasions for Sunder to climb a truck, but it remained unsuccessful and repeated efforts made Sunder somewhat aggressive and uncooperative. Assistance of Bannergata National Park was sought to facilitate shifting of Sunder from Kolhapur to Bengaluru.

17. A further rejoinder has been filed on behalf of the Petitioner on 26th February, 2014 wherein it has been contended that the behaviour of Sunder clearly indicates severe mental stress and displaying aggressive behaviour and mock charging towards its own mahout (and his assistant mahout). The examining officers were standing barely 3 meters from Sunder, who displayed no aggression at all towards the visiting team. This sets out that Sunder is distressed and disturbed only when his own mahout or assistant mahout approach him or comes nearby indicating that he is not being treated humanely by the persons. The affidavits includes photographs displaying aggressive behaviour in the presence of mahout and the presence of elephant experts during the visit at Warananagar, Kolhapur displaying that the hinds legs have scar tissues indicative of previous deep wounds from chaining for long hours. Sunder is housed in a shed exposed to the natural elements with concrete flooring and exposed to hot sun in the back side and cold winds and chilly weather at night. The photographs annexed include some showing the forelegs closely tied together with heavy chains, facilities of boarding and transportation of elephant etc. None of these are in dispute.

18. We have the rival contentions of the parties as to whether or the elephant is

musth, musth is a temporary phenomenon during which a male elephant shows aggressive behaviour. It is common ground that during musth period, it is not advisable to attempt to shift an elephant. Further examination and health evaluation of Sunder as directed by this Court vide order dated 13th February, 2014 has been annexed to the affidavit. The report is a joint report dated 20th February, 2014 is issued by Dr. E.K. Easwaran, Assistant Director, Elephant Expert, Department of Animal Husbandry, Kerala and Dr. Yaduraj Khadpekar, Senior Veterinary Officer, Elephant Expert, Wildlife SOS, India, New Delhi. The report recommends that Sunder in his present state can be transported to an elephant care and rehabilitation Centre under regular sedation and transportation protocol. It further recommends that Sunder needs immediate enrichment of environment by appropriate association with other elephants in a rehabilitation and care centre to avoid any further permanent damage to mental status which shall, if left in his current condition, will eventually make him a rogue and dangerous through his lifespan and difficult to manage in captivity. Much material has been produced by both the sides, inter alia regarding the guidelines of the care and management of captive elephants.

19. We now deal with the second petition filed by Respondent No. 4 in the first petition. The second petition was tagged with the first petition pursuant to the directions of this Court dated 13th February, 2014. By the said order, the Court directed Respondent No. 4 in the first petition and the Petitioner in the second petition to permit the members of PETA to examine the elephant in the ensuing week from 15th February, 2014. The Petitioner in the second petition contends that elephants have been in the service of deity since a long time and that Sunder is being looked after. He contends that Respondent No. 1 has passed ex-parte order on 21st August, 2012 without jurisdiction and in breach of rules and natural justice. The Petitioner contends that the elephant is presently being maintained by the Warana Group and a team of 30 veterinary doctors/surgeons are employed with the said diary and in any event, the elephant has been properly taken care of. The allegations have been made that Respondent No. 6, Petitioner in the first petition, has been approaching the media and press and is disseminating selective information in order to prejudice the public opinion and minds of the officers charged with the functions under the said Act. The Petitioner also seeks recall of the order dated 21st August, 2012 and order dated 9th November, 2012. The Petitioner contends that he has sent the expert team to review the condition of the elephant and that expert team has recommended the elephant to be retained at the same place subject to creation of a rescue centre. The fact remains that no steps whatsoever has been taken to create the centre for housing the elephant.

20. An affidavit in reply has been filed by the Deputy Conservator of Forest which reiterates the stand taken by him in the first petition. He contends that there is no merit in the second petition. It is averred that Government of Maharashtra has inherent powers and jurisdiction to issue directions and to get the same implemented in accordance with Section 4(2) of the Act. In fact, he supports the

issuance of the order of 21st August 2012.

21. Having given careful consideration to the rival contentions of all the parties in both the above petitions, we are of the view that interest of the captive elephant must be foremost in the mind. None of the parties have controverted the photographs or the facts that injuries have been found on Sunder or that he is chained and unduly restrained most of the time nor have they assailed any material findings of the assessment reports of the experts in the field. To accept the view of Respondent Nos. 2 and 4 in the first petition as contained in the affidavit filed by them in the first petition as also the averment of the Petitioner in the second petition is not possible. It cannot be disputed that our focus should be to ensure the welfare of Sunder. No doubt, elephants have been pressed into service since times immemorial for religious functions, however, to insist that Sunder must be retained by Devasthan, Respondent No. 1 or Warananagar Group, Respondent No. 4 is unreasonable.

22. Although, Respondent No. 4 has expressed his intention to set up elephant rehabilitation centre, as of date, Sunder is confined to concrete floor in unnatural surroundings which are unsuitable for maintaining him. Sunder is being deprived of his basic requirement and promise of natural surroundings. No attempt has been made to even provide pseudo natural surroundings. It is a well document fact that elephants are highly cognitive and intelligent animals and it is in the best interest of Sunder that the impugned order dated 21st August, 2012 be implemented in the best feasible manner and in according with the suggestions of the experts in the field.

23. This brings us to the issue of jurisdiction raised in the second petition. Section 4(2) and Section 5 of the Act empowers the State Government to issue such directions it may need to issue from time to time, give.

24. The Devasthan Committee has not raised the issue of jurisdiction and the affidavit filed by Rajaram Raghunath Mane, on behalf of the said Respondent has denied the allegations contained in the first petition. In fact, he goes on to state that Devasthan Management Committee on 26th December, 2013 passed a Resolution that Sunder "will be" gifted to Warana Sahakari Dudh Utpadak Sahakari Society. The date of the resolution is of much significance since it comes barely a month after the present petition is filed. When the Court inquired of Respondent Nos. 2 & 4 as to what steps have been taken by them pursuant to the oft repeated promises of setting up the elephant care centre after the offer was first made in 2012, a submission is made across the bar that the land which was in contemplation for the care of elephant health centre is under control of an Administrator and that unless the competent authority passes appropriate orders permitting use of the said land, it would not be possible to create the elephant health centre.

25. This is a submission made across the bar. The pleadings are conveniently silent. It is, therefore, evident that no elephant health centre is likely to come up

in or around the premises of the temple in the near future however good the intention of Respondent Nos. 2 & 4 are. In the event of any elephant health center being set up or arranged for the elephant, thereafter the elephants in captivity may be vested with the temple, if the law permits. We are satisfied and hold that Respondent No. 4 has no locus to question the jurisdiction of the Joint Secretary (Forests), Revenue and Forest Department, Government of Maharashtra to issue order dated 21st August, 2012.

26. Translocation of animals is not unknown. Article 21 of the Constitution of India also casts an obligation on humans to protect and conserve the environment. In *M.C. Mehta Vs. Kamal Nath and Others*, . The Apex Court enunciated the Doctrine of public trust entailing that common property such as reserve forests and wildlife etc. should be protected by Government. The State as a custodian of these resources has a duty to maintain the natural resources to maintain not merely for the benefit of the humans but also for the best interests of the wildlife animals. This doctrine of public trust can be pressed into service in the present case. Furthermore under Article 51A(g) of the Constitution of India it is the duty of every citizen of India to protect and improve the natural environment including forests, rivers and wildlife and to have compassion for living creatures. Consequently, both the Central and State Governments have been mandated with the responsibility of the protection of conservation and wildlife. Laws being man-made, there is likelihood of bias towards the man and the rights of animals have been treated as subservient. It is duty of the Court to ensure that the balance exists in the system. The dispute is of ownership of Sunder notwithstanding, the fact remains that the opinion of the parties of granting Sunder well being has been forsaken. As it stands, after the complaint pertaining to the Sunder's ill-treatment and undesirable surroundings were first received and the passing of the order on 21st August, 2012, Sunder remains confined.

27. In the result, we direct that the order dated 21st August, 2012 be implemented forthwith in accordance with the provisions of the Wildlife (Protection) Act, 1972 without any further delay and in any event, before the onset of the monsoon. The facility at Bengaluru is closer to the present location of Sunder and it is not possible to accept the suggestion of the Petitioner to transport the elephant to Mathura although the facilities at Mathura may be more modern. That suggestion may be considered by the authorities at a later point in time. The prime consideration is to ensure that the elephant is set free from its present state of captivity. We may observe that the observation made by the Wildlife Rescue & Rehabilitation Centre in letter dated 17th December, 2013 addressed to the Petitioner to the effect that the Petitioner may state alternative sites for housing Sunder was relevant only during winter when the movement of the elephants is very frequent. This is no reason to prevent Sunder from being shifted to Bengaluru. Accordingly, the elephant should be transported to the facility of Bengaluru by using suitable methods in the best interest of the elephant. The State, the Chief Conservator of Forests and the Chief Wildlife

Warden to take appropriate measures to ensure that the transportation is effected in the best possible method and in consultation with the experts in the field. They may take the assistance of the Petitioner in this regard.

28. In the circumstances, rule is made absolute in terms of prayer clause (b) in Writ Petition No. 2662 of 2013 with no order as to costs.

29. However, Writ Petition No. 887 of 2014 fails and is dismissed with no order as to costs. Rule stands discharged. At this stage, the learned Senior Counsel appearing for the Petitioner in Writ Petition No. 887 of 2014 seeks stay of the order passed in Writ Petition No. 2662 of 2013. Request for stay is opposed by the learned counsel appearing for the Petitioner in Writ Petition No. 2662 of 2013. Ad-interim order was passed by this Court in December, 2013 in terms of prayer clause (b). Interim order was in operation till today. By this judgment, we have confirmed the said interim order. In this view of the matter, granting of stay does not arise.